and to grant him in addition thereto three separate trials. The petitioner requested a separate trial as to Count I, wherein it was alleged that the petitioner participated in some eight post office break-ins; a separate trial as to Counts VI and VII which dealt with the post office burglary at Camdenton, Missouri, on February 16, 1965, and finally a third trial with respect to Counts VI and VII, or the Maryville, Missouri, burglary which took place on May 10, 1965. A portion of the petitioner's motion was sustained in that he was severed from the remaining defendants, however, his request for a separate trial as to the various counts was denied by Judge Elmo Hunter, United States District Court, Western District of Missouri, before whom the petitioner was originally tried, convicted, and subsequently granted a new trial as an outgrowth of what Judge Hunter felt to be an instructional error. Miller was retried before the Honorable William R. Collinson, Judge, United States District Court, Western District of Missouri, along with another defendant, one Robert Holland. Judge Collinson also denied Miller the requested relief filed by him pursuant to Rule 14, Federal Rules of Criminal Procedure, requesting three separate trials.

As the Court of Appeals noted, the conspiracy was spawned by defendants Richard Christenson and William Conway. Both Christenson and Conway testified for and on behalf of the United States, along with four of the co-conspirators who were not named as defendants. Post offices were unlawfully entered and postage and savings stamps taken and disposed of by sale to three of the named defendants, James Harvey Bradley, Donald L. Paustian and Leonard J. Taylor. Christenson asserted that he had burglarized 35 post offices, while Conway stated that he had perpetrated at least 28 post office burglaries, including some 18 along with witness Christenson.

Mr. Christenson testified that he met Petitioner Miller in a tavern in St. Louis, Missouri, during the month of.

February, 1965. Christenson stated that he invited Miller to accompany him on one post office burglary and that on February 16, 1965 he and Petitioner alone traveled to Camdenton, Missouri where they burglarized the Post Office of that rural community. The two men then drove to Manhattan, Kansas, and attempted to sell the stamps they had obtained in the Camdenton burglary to Paustian and Taylor. Paustian and Taylor, evidently, lacked funds to acquire the stolen stamps and escorted Christenson and Miller to Kansas City and introduced them to Junior Bradley, a larger fence. The stamps were then sold to Bradley for the sum of $4,400.00, which Miller and Christenson divided equally. It was during this meeting that Bradley informed both Miller and Christenson that he would purchase all of the stamps they were able to acquire.

With respect to Counts XV and XVI, Christenson stated that on May 10, 1965, he, Miller, William Conway, co-conspirators John F. Hanrahan and Richard C. Wright burglarized the postal facility in Maryville, Missouri. This testimony was corroborated by Conway, Hanrahan and Wright, all of whom testified for and on behalf of the United States.

In all, witness Christenson testified to eight post office break-ins that he had perpetrated with petitioner Miller. Two additional co-conspirators likewise testified for and on behalf of the United States, corroborating portions of Mr. Christenson's testimony. Marie Michel Christenson testified that she had accompanied petitioner Miller and her husband while they had burglarized the post offices at Sesser, Illinois; Bedford, Iowa; and Bourbon, Missouri, and Millstadt, Illinois. Charles Robert Long testified that he had assisted in the burglary of the post office at Millstadt, Illinois.

With respect to Counts VI and VII, Richard Christenson was the sole witness produced by the government at

Miller's trial. In addition to admitting 35 post office burglaries, Christenson pointed out that he had plead guilty to but two counts of the indictment that jointly charged he, petitioner Miller and some 18 others and had not at the time of petitioner's trial been sentenced. Christenson admitted that at the time of trial he was serving a sentence for a federal counterfeiting offense, that he was under sentence in the State of Missouri for the offense of burglary in the first degree and that in 1959 he received three armed robbery convictions.

Petitioner Miller did not testify in his own behalf.

REASONS FOR GRANTING THE WRIT.

Rule 14 of the Federal Rules of Criminal Procedure provides:

> "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the Court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

This rule was articulated in a superior fashion in **Drew v. United States**, 331 F. 2d 85, wherein the United States Court of Appeals, District of Columbia Circuit, stated:

> "The justification for a liberal rule on joinder of offenses appears to be the economy of a single trial. The argument against joinder is that the defendant may be prejudiced for one or more of the following reasons: (1) He may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) The jury may ac-

cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find. A less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one. Thus, in any given case the Court must weigh prejudice to the defendant caused by the joinder against the obviously important considerations of economy and expedition in judicial administration" (p. 88).

Petitioner Miller complains most bitterly of the joinder of Counts VI and VII and the failure of the trial court to afford him a separate trial with regard to these counts that arose out of the Camdenton, Missouri, Post Office burglary that resulted in petitioner's being sentenced to serve a ten-year term consecutive with the sentences imposed with regard to the remaining three counts. A fair analysis of the evidence surrounding the Camdenton episode argues strongly in support of the position urged by the petitioner. Witness Christenson was the sole source of the government's evidence adduced against petitioner with regard to the burglary of the Camdenton, Missouri, Post Office. With respect to the remaining three counts, both the conspiracy count and the Maryville, Missouri, count, a total of five witnesses who were either co-defendants or co-conspirators, in addition to Mr. Christenson, testified against petitioner Miller. It is urged most strongly that a far different result and entirely different defense trial tactics would have been employed in the trial of the Camdenton, Missouri, burglary, if such trial were to have been afforded the petitioner on a separate basis. It would pit this petitioner against an individual who admits burglarizing some 35 post offices and, in addition thereto, has been convicted of counterfeiting, three armed robberies, and burglary in the first degree.

It is strongly urged that the petitioner's position falls squarely within the teachings in the **Drew** opinion recited herein. The appearance of six witnesses, as was the case, as against the appearance of one witness certainly confounded and convicted the petitioner. It is also worthy of mention to point out that it is an understatement to say that there was a reasonable possibility that a latent feeling of hostility may have been engendered in the jury as a result of their having heard an overwhelming amount of testimony concerning lawless activities.

The facts of this case indicate that at the time of the Camdenton, Missouri, burglary in February of 1965, neither Christenson nor petitioner Miller knew of the existence of one Junior Bradley who was shown to be the principal fence for items obtained in postal burglaries. It was after the Camdenton experience that Bradley was located and indicated a willingness to purchase any additional stamps acquired by Christenson and Miller thus further rendering this offense factually separate and distinct.

Petitioner also relies upon **Cross v. United States**, 335 F. 2d 987, United States Court of Appeals, District of Columbia Circuit, where Chief Judge Bazelon stated:

> "We need not decide whether the joinder here of two offenses and two defendants was proper under Rule 8 of the Federal Rules of Criminal Procedure because we think that, in any event, severance of the counts for trial was required by Rule 14. . . . Prejudice may develop when an accused wishes to testify on one but not the other of two joined offenses which are clearly distinct in time, place and evidence. His decision whether to testify will reflect a balancing of several factors with respect to each count: The evidence against him, the availability of defense evi-

dence other than his testimony, the plausibility and substantiality of his testimony, the possible effects of demeanor, impeachment, and cross-examination. But if the two charges are joined for trial, it is not possible for him to weigh these factors separately as to each count. If he testifies on one count, he runs the risk that any adverse effects will influence the jury's consideration of the other count. Thus, he bears the risk on both counts, although he may benefit on only one. Moreover, a defendant's silence on one count would be damaging in the face of his expressed denial in the other. Thus, he may be coerced into testifying on the count upon which he wished to remain silent. It is not necessary to decide whether this invades his constitutional right to remain silent, since we think it constitutes prejudice within the meaning of Rule 14" (pp. 988, 989).

Petitioner Miller found himself at the trial of five joined counts, in precisely the situation deemed prejudicial in the **Cross** case. This position was made clear before both trial judges and before the United States Court of Appeals for the Eighth Circuit which concluded "the result contended for— . . . three separate trials for Miller— would do violence to the letter and spirit of the law and run contrary to our conception of orderly and efficient administration of justice" (p. 8, p. 9).

It is urged that the Court of Appeals has erred in its desire to afford the parties the economy of a single trial. Petitioner Miller could simply not receive a fair trial with the joinder of counts that has taken place in the instant proceeding. If any real meaning is to be attached to Rule 14, its spirit and letter have been violated herein.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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